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No. 80-5889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY
Petitioners,

v.

BERNHARDT S. KRAMER, Commissioner
ULSTER COUNTY DEPARTMENT OF
SOCIAL SERVICES
Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Section 622 of the New York Family Court Act is unconstitutional because it permits a finding that a child has been permanently neglected based upon a "fair preponderance of the evidence."

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case centers around three children who have been in foster care most of their lives. Annie Santosky is the natural mother of all the children, Tina, John III and Jed. John Santosky is the natural father of John III and Jed. At Tina's birth, Mr. and Mrs. Santosky were 16 years old.

The circumstances which led to the foster care placement of these children would offend any reasonable person. Problems in the Santosky home first surfaced in the fall of 1973 with Tina. Although the agency technically filed a neglect petition, the underlying facts constituted child abuse. On September 10, 1973, Tina was taken to Ellenville Community Hospital where the attending physician recom-

mended hospitalization for a broken leg. However, the parents took Tina home without treatment and applied a home-made splint (E 1-2).[1] On September 23, 1973, responding to a neighbor's complaint, the police returned Tina to the hospital. The child had severe bruises on her upper arms, forehead, flank and spine as well as cuts on her upper leg (E 2). Tina was removed from her parents in November of 1973.

The Ulster County Department of Social Services began to work with the family towards the statutory goal of rehabilitation and return of the child to the parents. Although she was still technically in the custody of the agency, Tina was actually returned home on a trial basis in June of 1974 (E 134). However, any solution the agency's efforts had achieved was shortlived (E 135).

John III was removed on August 19, 1974. In addition to evidencing malnutrition to the point where he required immediate hospitalization (E 3), he had been subjected to multiple pin pricks as discipline for not sitting up in his high chair (E 5). The Department of Social Services took temporary custody of Jed three days later on the grounds that his immediate removal was necessary to avoid imminent danger. Tina, still in the agency's custody, was also removed. The underlying facts resulting in the removal of these children were never contested by Mr. and Mrs. Santosky. (E 219-221). Furthermore, at a hearing held on September 30, 1974, in which they were represented by counsel, the Santoskys allowed the agency to take custody of all their children (E 18 & 21).

The children's temporary removal mandated that the

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[1] The designation (E 1-2), refers to Respondent's Exhibit, pages 1-2. Ten copies of Respondent's Exhibits to its brief have been filed with the clerk of the Court.

agency obtain several extensions of foster care placement as time went on. For a substantial period of time, only one placement extension was contested. Moreover, the children remained in foster care without objection after July 15, 1975 although the appropriate orders had expired (E 666).

At the foster care extension hearing [2] in which the parents and the children were represented by counsel, a social worker traced the background of the case and testified that after Tina was removed, the agency offered an intensive service program from the Child Protection Unit to the Santoskys (E 34). As a result, Tina was returned home upon a private plan between the agency and the parents (E 49). As previously mentioned, John III had been born, and Annie Santosky was pregnant with Jed. Unfortunately, abuse problems resurfaced, and all the children were removed. The agency then requested that the parents attend a Mental Health Clinic, which the Santoskys agreed to do (E 37).

The Director of the Southern Ulster Mental Health Clinic testified that Mr. Santosky had serious emotional problems which rendered him incapable of raising children (E 67, 69 & 100). He also stated that his opinion had been formulated months ago and as he had not counseled Mr. Santosky since June of 1975 (E 69) the problems still remained (E 70). He also noted that when Mr. Santosky was in counseling, he attended less than half the sessions (E 78), and denied a problem existed (E 86).

In a written decision dated December 31, 1975, the court found that the Santoskys were unable to assume their parental responsibilities due to personality disorders and granted the placement extension (E 628-634). The court also directed the agency submit to the court for approval a written

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[2] The hearing was held on December 2 & 5, 1975. Counsel has been unable to locate either the transcript or the recorder's notes for the proceeding held on December 5, 1975.

plan to solve the problems at home and reunite the family (E 635-636). The agency complied with the order within thirty days (E 639-641) and the plan was approved by the court in February 1976 (E 642).

Dissatisfied with the progress of the Santoskys and concerned over the lengthy foster care status of the children, the agency moved to terminate parental rights on September 8, 1976. Since the Santoskys had never formulated a plan of their own, the case centered around what had been accomplished under the agency's plan to improve the situation which resulted in the initial child abuse.[3]

Part one of the plan proposed to develop the Santoskys' parental skills by providing a mother's aide, a nutritional aide, and a public health nurse. The Santoskys terminated the use of the mother's aide shortly after it had begun (E 305-306), and failed to attend scheduled appointments at the baby clinic (E 309). They did, however, cooperate with the nutritional aide.

Part two of the plan dealt with family planning services. Although strenuously urged, family planning had only been grudgingly considered after the February 1976 approval (E 163-164). Even after the court order, Mr. and Mrs. Santosky failed to utilize the services of Planned Parenthood of New Paltz, and consistently rejected family planning services (E 303, 392).

Parts three and four of the plan dealt with the important area of counseling. Here, the agency offered psychiatric treatment for Mr. Santosky and counseling from the Family Service Center for Mrs. Santosky. These were eventually

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[3] Although the plan was not specifically reduced to writing until January 1976, it had been in effect since the problems arose in 1973 (E 128-129, 303, 306-311) and was personally explained to the Santoskys (E 359).

combined to provide counseling from the Family Center for both. Once again, the service was considered by the Santoskys only after the court approval (E 140). Prior to the approval, Mr. Santosky had completely rejected the services of the Family Center (E 302).

It was also established that the Santoskys did not even begin to attend the Center until March 1976 (E 193), some three years after the agency had become involved with the family. Furthermore, in the period between the initial appointment and the trial, Mr. and Mrs. Santosky missed almost half of the sessions (E 194). However, the director of the center, Mrs. Elizabeth Smith, testified that they were making *movement forward* in a *positive direction* (E 212-213, 241).

The final area of the plan dealt with employment. Mr. Santosky was offered the services of a vocational rehabilitation program which he quit prior to completion (E 507) but rejoined after the February 1976 court order. Despite a poor to fair attendance record, vocational counselors testified that he was demonstrating *progress* (E 339) and *movement* (E 481).

Both parents took the stand at the hearing. Mr. Santosky testified that he understood why the children were initially removed (E 516). He also stated that he was providing more room at home for the children (E 488) and that he would like to see them come home one at a time (E 519). Mrs. Santosky testified that she understood why the children were temporarily removed (E 559, 562).

At the close of the testimony, the government argued that the Santoskys' progress was so minimal that no return was possible in the foreseeable future. Since the agency demonstrated that the children needed a permanent home quickly (E 648, 654, 660), it argued that the parental rights should be terminated. This approach was rejected. The court noted

that under New York law, the parents must be judged by standards which are reasonable under the circumstances (E 613-616). Thus, even though their efforts were minimal, they did utilize some of the services offered (E 620). With this effort,[4] they were taking steps to eliminate the initial problems, thereby planning for the future of their children under New York law. Accordingly, the petition was dismissed.

On appeal, the court found that the Santoskys' efforts constituted planning and were sufficient to thwart the agency's termination action. *See Matter of John W.*, 63 A.D. 2d 750, 751, 404 N.Y.S. 2d 717, 719 (3rd Dept. 1978).

In addition to losing its case, the agency was instructed to redouble its efforts so that the parents could achieve a minimal competency level (E 624). This was far easier said than done. Parental exposure resulted in psychological trauma to the children and the agency attempted to cut off visitation rights (E 678-681). In a decision dated June 14, 1977, the trial judge ruled that although he could not, considering the initial problems in the home, in good conscience return the children to Mr. and Mrs. Santosky (E 672), the agency must allow visitation and attempt to reunite the family, notwithstanding any problems conferred upon the children.

On October 16, 1978, Respondent filed a petition alleging that the children were permanently neglected. A trial of the issues raised in the petition was held on January 23, 26, 31 and February 1, 1979. At the hearing, all parties were represented by counsel as they must be under New York law. The court took judicial notice of its own records relating to the proceeding (J.A. 20). In so doing, the trial judge was evaluating what progress, if any, the Santoskys had

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[4] The court went so far as to call their efforts superficial (E 618).

made towards the reunification of their family. He could also evaluate agency efforts, over the course of the years, to solve the problem.

The court's opinion recites the eleven various services which the agency offered, arranged for, and encouraged the Santoskys to accept during the two years prior to trial. These services were refused (Tr. 14, 16, 18).[5] No evidence was ever submitted at trial that the parents had an alternate plan of their own. Furthermore, during the course of many contacts with social workers, the Santoskys never asked when their children would be returned home permanently (Tr. 20). The Santoskys were fully aware of the agency's services (Tr. 72), and still refused to cooperate.

The record shows, and the judge found, that all the essential services were either refused (Tr. 152) or ineffective in accomplishing the goal. The major areas of the plan were psychological counseling, aid in dealing with children and Mr. Santosky's employment difficulties. Case workers involved with the Santoskys testified that there was no forward movement (Tr. 83) in these areas.

Concerning employment, Mr. Santosky was no longer utilizing the vocational services (Tr. 40, 82) or attending classes at the adult learning center (Tr. 131); and he was still unemployed.

Due to the circumstances under which the children had to be removed, psychological counseling was an important aspect of the plan. Respondent takes strong exception to any assertions that the Santoskys participated in therapy. Rather, these services were repeatedly rejected (Tr. 29, 94). In point of fact, the last time the Santoskys engaged in psychological counseling was June of 1975 (E 69). The San-

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[5] Tr. refers to the transcript of the hearing held on January 23, 26, 31 and February 1, 1979.

toskys refused to make any efforts here, despite the fact that as of December 1977, problems still existed. A psychological evaluation of Mr. Santosky revealed frequent grossly disordered thought processes. His responses indicated an underlying psychosis against which he had few effective defenses. There was evidence of particular difficulty controlling aggressive impulses and a fear of being the victim of destructive forces which were beyond his control (E 679-681). An evaluation of Mrs. Santosky indicated a dependent personality who viewed the male figure as dominant, cruel and harmful (E 684).

The Santoskys were attending the Family Service Center. However, their attendance had fallen off (Tr. 95), to the point where they were only attending one-third of the sessions (Tr. 345). Furthermore, Mrs. Elizabeth Smith, the director of the center, is a social worker, not a psychologist (Tr. 349), and could not provide psychiatric counseling (Tr. 184).

Rather, Mrs. Smith directed her attention to helping the Santoskys deal with the eventual return of their children, perhaps the most important aspect of the plan. Therefore, she, along with the agency (Tr. 104-105), encouraged Mrs. Santosky to participate in the Child Enrichment Program; but this important service was also refused. Thus, Mrs. Smith concluded that the children could not be returned home in the foreseeable future (J.A. 16-18). Her opinion was corroborated by Dr. Sportsman, a child psychiatrist (Tr. 237-239).

In contrast to the first termination proceeding, neither of the Santoskys took the stand to testify about their plans or dreams for the return of the children.

After evaluating the evidence, the court concluded that the Santoskys had refused to plan for the future of their children although able to do so. The court noted that their

failure to utilize any of the services offered was almost total and complete (J.A. 35). It stated that their minimal efforts had tapered off to the point where they were no longer measurable (J.A. 37). Thus, the children were permanently neglected.

However, the Santoskys' parental rights were not and could not have been terminated at the fact finding hearing. Under New York law, the parents are entitled to a dispositional hearing first. At this proceeding, held on April 5, 1979,[6] Mr. and Mrs. Santosky presented no evidence that the children's best interest required a return to their home (E 694), but merely requested visitation rights (E 698).

The court promptly ordered termination.

SUMMARY OF ARGUMENT

Unless a proceeding involves a "fundamental liberty interest" the issue of burden of proof is not of constitutional moment. The concept of what constitutes a fundamental liberty interest is not expansive, but rather applies to limited, well-defined circumstances such as restraints to physical liberty. Because a proceeding to terminate parental rights does not involve a fundamental liberty interest, the New York burden of proof standard cannot be said to violate Petitioners' due process rights. Simply stated, the Court's decisions regarding family matters demonstrates that New York's choice of burden of proof standard is not in disharmony with a fundamental value determination of society.

The Fourteenth Amendment does not mandate a burden of proof greater than a preponderance of the evidence under the New York statutory scheme. The due process rights of parents are zealously protected by statute and by the N.Y. courts. The statute provides specific and readily ascertain-

[6] This proceeding, enclosed as Respondent's Exhibit 11, was transcribed at counsel's request in July 1981.

able conditions which must be met before a court can terminate parental rights. Hence there is little risk of an erroneous termination of parental rights under existing New York law. Furthermore, the interests of the child require that the preponderance of the evidence standard be applied under the New York statutory scheme.

A review of the record in the instant case demonstrates the appropriateness of the present burden of proof standard. In the alternative, the instant case need not be remanded since it is correct under any standard of proof.

ARGUMENT

I. The Fourteenth Amendment Does Not Mandate A Burden of Proof Beyond A Preponderance of the Evidence in TPR Proceedings.

The question of what burden of proof should be applied in a particular litigation involves a consideration of the substantive due process requirements of the Fourteenth Amendment. The requirement of proof beyond a preponderance is applicable only when a fundamental liberty interest is at stake. To hold otherwise would be contrary to the spirit of the decisions on the issue and create a precedent for unwarranted intrusion into legislative discretion. This result would logically follow with drastic consequences since there is no significant difference, in a burden of proof context, between the instant case and other civil litigation.

Accordingly, there is no need for an emotional distinction between this case and a condemnation action or a licensing procedure. Such a relative comparison of the interests involved is very much beside the point. The only relevant analysis in burden of proof decisions is whether the liberty interest involved is fundamental. If so, the Fourteenth Amendment addresses the issue. If not, the choice of a particular burden of proof lies within the sound discretion of a state legislature.

The Constitution does not specifically enunciate the right to raise one's children as being fundamental. However, the Fourteenth Amendment does proscribe the taking of property or liberty interests without due process of law. Since the Constitution has expressly equated these rights, it is neither necessary nor proper for the Fourteenth Amendment to be rewritten and the right to raise one's children elevated above the other property and liberty interests possessed by American citizens and safeguarded by the application of procedural due process.

There should be no doubt but that *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), heavily relied upon by Petitioners, is a procedural due process case. The issue in *Matthews* was whether a hearing was required before disability benefits were terminated. This question, of course, was answered in the affirmative.

Under *Matthews*, any time the government swings the club of state action against a citizen, the shield of the Fourteenth Amendment rises to provide a certain bundle of rights. Included in this legal package, among other rights, are notice, opportunity to be heard, and the right to cross-examine witnesses. A particular burden of proof is not included in these rights but, rather, is applicable only when a fundamental liberty interest is at stake.

A. A TPR Proceeding Does Not Interfere With A Fundamental Liberty Interest.

It should be clear from *Lassiter* v. *Department of Social Services*, 49 U.S.L.W. 4586 (1981), that, since a TPR proceeding does not concern physical freedom, a fundamental liberty interest is not at issue. *Lassiter* implicitly recognized that the right to the custody of one's children is a relatively modern legal concept resulting from an evolution of Anglo-Saxon law. Thus, considered in light of the proper historical

background,[7] the parent-child relationship is a far cry from the universal, ancient, and fundamental concept of the right to physical liberty.

In Colonial America, for pragmatic reasons, the interests of the community transcended individuals' rights in many areas. This had an interesting application to the parent-child relationship. In many respects, the community was the principal and the parent was the agent. As agents of the community, parents were given the job of raising desirable and productive citizens. This job was considered so important that it outweighed the value of family ties. If the parent fell short of the task, the child was removed from the home.[8] It was as simple as that.

Local laws were passed to ensure that the parents performed their obligations, but they varied widely depending upon the nature of the community. When the colonists formed the government and drafted the Constitution, no mention was made of the parent-child relationship. The diversity of values on the issue could not be translated into one simple due process formula to be policed by the federal government. This led to a substantial variation of state laws dealing with termination of parental rights.

The diversity of values which exists in American culture concerning the parent-child relationship is particularly relevant there. The burden of proof decisions, beginning with *In Re Winship*, 397 U.S. 358 (1970), are grounded in the universally high regard for the protection of physical liberty. Thus, no state is allowed to diverge from proving criminal guilt beyond a reasonable doubt. The entire thrust of this line of cases is to ensure uniformity, not diversity, in decid-

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[7] See Giovanni & Becerra, *Defining Child Abuse* (1979), pp. 31-75, where the evolution of the legal relationship between parents, their children, and the state is extensively discussed.

[8] *Defining Child Abuse, supra*, 38-40.

ing burden of proof questions when physical freedom is threatened. The reasoning is diametrically opposed to the Founding Fathers' attempts to allow for diversity in this area of family law.

B. Due Process Considerations May Impose A Particular Burden of Proof On The States Only When A Fundamental Liberty Interest Is At Issue.

As articulated by Justice Harlan, the choice of the standard of proof to be applied in a particular kind of litigation reflects an assessment of the comparative social disutility of the potential erroneous outcomes inherent in a proceeding. *In Re Winship*, 397 U.S. 358, 371 (1970) (J. Harlan concurring); see generally, Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977). In *Winship*, a case dealing with the burden of proof in a juvenile delinquency proceeding, two erroneous outcomes were possible: an innocent juvenile could be found guilty of the commission of a crime and incarcerated; or a guilty juvenile could be adjudged not guilty and set free. In its analysis the Court noted that the requirement for a higher degree of persuasion in criminal cases dated back to ancient times and that adherence to a reasonable double standard reflected a "profound judgment about the way in which law should be enforced and justice administrated," 397 U.S. at 361-362, quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968). Thus, the Court held that in a society where it is a fundamental value that it is far worse to convict an innocent man than to let a guilty man go free, due process of law requires proof beyond a reasonable doubt.[9]

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[9] Indeed, in our society it is practically self-evident that due process requires a more stringent standard than a preponderance of evidence in criminal proceedings. It was not until 1970 that the Court dealt with this issue "because of the nearly complete and longstanding acceptance of the reasonable doubt standard by the states," *In Re Winship*, 397 U.S. 358, 372 (1970) (J. Harlan concurring).

Similarly, in *Addington* v. *Texas*, 441 U.S. 418 (1979), the Court held that the Due Process Clause of the Fourteenth Amendment requires proof greater than a preponderance of the evidence standard in a civil commitment proceeding. In *Addington*, the Court assessed "the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof," 441 U.S. at 455. In effect, such an assessment is nothing more than Justice Harlan's assessment of the comparative social disutility of potential erroneous outcomes. The Court weighed the disutility of erroneously committing an individual to a mental institution for an indefinite period against the social disutility of not committing those who require treatment. Although there is an extensive social disutility in not committing and treating those mentally ill individuals who should be so committed, the Court found that this possible outcome is greatly outweighed by the individual's fundamental interest in his own liberty. 441 U.S. at 425-427. Hence, the preponderance of evidence standard in a civil commitment proceeding does not satisfy the requirements of due process.

At this juncture, it is important to note that the liberty interest at stake in *Winship* and *Addington* was the fundamental right to remain free in society. When the individual faces wrongful loss of liberty through an erroneous criminal conviction or civil commitment, the Court has ruled that the burden of proof becomes an issue of constitutional moment. Admittedly, other liberty interests have been recognized by the Court as having procedural due process implications. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (privacy). Nevertheless, although confronted with the issue in several different settings, the Court has never ruled that any liberty interest other than the physical liberty of remain-

ing free in society requires a burden of proof greater than a preponderance of the evidence as a matter of the Due Process Clause.

The immigration decisions are not to the contrary. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966), cited by Petitioners, was not a constitutional ruling but rather was a case where the Court was required to "read" a burden of proof standard into a deportation statute in light of Congressional silence.[10] The Court did not proceed to rule on the merits of the case until it analyzed the relevant statute and determined that Congress had "not addressed itself to the question of what degree of proof is required in deportation proceedings." 385 U.S. at 276.

Furthermore, the immigration decisions are in accord with the principle that the burden of proof is not a constitutional issue unless physical liberty is at stake. In *Woodby* (deportation) and *Schneiderman* v. *United States*, 320 U.S. 118 (1943) (denaturalization), the potential deprivation was the right to physically remain in the United States, obviously constituting a fundamental liberty. Thus, the Court preferred a burden of proof higher than a preponderance of the evidence. These cases are in contradistinction to *Vance* v. *Terrazas*, 444 U.S. 252 (1980) (expatriation) where the individual could, if the government was successful, still remain physically free in society, notwithstanding the loss of citizenship.

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[10] Similarly, in *Fedorenko* v. *United States*, 101 S.Ct. 737 (1981), a case cited by *Amicus Curiae*, the Court did not render a ruling of constitutional dimension nor even a decision involving burden of proof. Rather, the Court resolved, as a matter of statutory interpretation, the issue of whether an immigrant's failure to disclose in his application for a visa that he had served as an armed guard for the Nazis in Poland, rendered his citizenship revocable as "illegally procured" pursuant to statute. The issue of burden of proof was not before the Court.

Thus, where the Court agreed that the frequency of incorrect denial of welfare benefits could be high and the state's interest in screening out fraudulent welfare claims was relatively low, the Court nonetheless held that the Fourteenth Amendment did not compel altering of the state created burden of persuasion which fell upon the welfare claimants. *Lavine* v. *Milne*, 424 U.S. 577 (1976). The Court noted that "outside the criminal law area, where special concerns attend, the focus of the burden of persuasion is normally not an issue of federal constitutional moment." 424 U.S. at 585. As a result, the Court deferred to New York's legislative determination concerning the burden of persuasion.

Similarly, the Court has refused to adopt, as a matter of constitutional law, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the guilt of an accused. *Patterson* v. *New York*, 432 U.S. 197, 210 (1977). In so ruling the Court recognized that it is normally:

> within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

432 U.S. at 201-202, quoting in part *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958).

In *Patterson*, the New York Legislature had weighed the social disutility of two erroneous outcomes: persons deserving treatment as murderers might escape punishment; conversely, individuals who should justly escape punishment, as a result of an affirmative defense, might be wrongly con-

victed. The Legislature, in making the determination that the former erroneous outcome outweighed the latter outcome, was required to subtly balance society's interests against those of the accused. The Court was unwilling to overturn such legislative decision-making. 432 U.S. 207-210.[11]

Nor did the Court strike down a preponderance of the evidence standard where the right affected by a possible erroneous determination was one of the most cherished rights possessed by a citizen, namely citizenship itself. In *Vance* v. *Terrazas*, 444 U.S. 252 (1980), the Court held that Congress did not exceed its constitutional authority by requiring proof of an intentional expatriating act by only a preponderance of the evidence. Although the Court, in analyzing relevant precedent, recognized its preference for requiring clear and convincing evidence to prove expatriation, it ruled that expatriation proceedings do not threaten a loss of liberty as in the criminal and involuntary commitment cases. 444 U.S. at 266. Accordingly, the Court deferred to the Congressional judgment that the preponderance standard of proof sufficiently protects the interest of the individual in retaining his citizenship.

In the instant case, one not involving the potential loss of physical liberty, the two potential erroneous outcomes can be stated as follows: the state may erroneously fail to terminate the relationship between a parent and a permanently neglected child, or the state may incorrectly terminate

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[11] Additionally, the Court did not accept the argument that the New York statute was somehow unconstitutional because the majority of states have now assumed the burden of disproving affirmative defenses, *Patterson* v. *New York*, 432 U.S. 197, 211 (1977). In the instant case, Petitioners point out that only twelve states utilize the preponderance of evidence standard in proceedings to permanently terminate parental rights. This "polling" of states is totally irrelevant to a consideration of whether Petitioners' due process rights have been violated. *See Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973).

a parent-child relationship. As discussed below, an assessment of the comparative social disutility of these outcomes does not result in a fundamental value determination, one rooted in the tradition and conscience of our society; as a matter of due process of law the burden of proof in a proceeding to terminate parental rights must be greater than a preponderance of the evidence. Therefore, the Court should defer to the standard of proof choice made by the New York Legislature.

C. The Court's Decisions Regarding Family Matters Do Not Compel The Conclusion That New York's Choice of Burden of Proof Standard Is In Disharmony With A Fundamental Value Determination of Society.

The fundamental value at stake in *Winship* and *Addington* was readily discernible. The Court in these two cases could state with certainty that the individual's interest in his liberty is so precious in our society that he cannot be incarcerated or committed to a mental institution without proof greater than a preponderance of the evidence of his guilt or mental illness. In contrast, as is apparent from the Court's decisions in the area of family law, it cannot be concluded that fundamental values of society dictate that, as a matter of due process of law, parental rights cannot be terminated without proof greater than a preponderance of the evidence of permanent neglect. *Cf., Lassiter* v. *Department of Social Services*, 49 U.S.L.W. 4586 (1981) (The Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding).

The Court has long held that the state has a wide range of power for limiting parental freedom and authority in matters affecting a child's welfare. *E.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944). Certain cases, such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) may be

readily cited for the proposition that freedom to raise one's children without unnecessary state intrusion is protected by the Due Process Clause of the Fourteenth Amendment. But these cases are clearly distinguishable from the case now before the Court because they are not cases involving a consideration of potential harm to the child. See *Wisconsin* v. *Yoder*, 406 U.S. at 230.[12] As stated by the Court:

> To be sure, the power of the parent, . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

406 U.S. at 233-234.

But, as discussed below, the instant case involves complicated, controversial, and subtle balancing of the interests of the child as well as those of the parent and state. Where the interests and well being of the children are at stake, so-called fundamental values frequently become blurred. Compare *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) (individual has right to be free from unwarranted government intrusion as to decision whether to bear or beget children) with *Quilloin* v. *Walcott*, 434 U.S. 247 (1978) (state may deny unwed father's authority to prevent adoption of his illegitimate child where father's interests are balanced by the interests of all parties concerned including the interests of the child).

In summary, the general rule emerging from the relevant cases is that the question of the proper burden of proof is a matter of state law unless physical freedom is at stake.

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[12] In *Yoder*, the Court limited its holding that Amish parents may not be criminally prosecuted for failing to send their children to school beyond the eighth grade, by its assertion that the case was not one in which any harm to the child was demonstrated or properly inferred. 406 U.S. at 230.

The Court's decisions in the family law area do not create an exception to the rule.[13]

Therefore, the writ of certiorari was improvidently granted.

D. At The Very Least, The New York Legislature's Burden of Proof Determination Must Be Allowed To Stand In The Absence of Overwhelming Evidence Of Fundamental Fairness Violations.

This Court has enunciated the principle that it does not sit as a super-legislature to determine the wisdom of laws pertaining to economic and social problems. *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). Since the Legislature has considered the burden of proof question, a presumption must arise that the decision is sound. *Lockport* v. *Citizens For Community Action*, 430 U.S. 259, 272-273 (1977).

Another presumption arises from *Lassiter*. At the time of the decision, a preponderance of the evidence was the standard for the termination of parental rights in North Carolina and, of course, counsel was not provided. Under New York law, *both* the parent and the child are entitled to a lawyer at a TPR proceeding. If litigating without counsel under a preponderance standard does not offend fundamental fairness, then certainly a hearing conducted under the same standard with counsel provided for all parties must also pass constitutional muster in the absence of blatant due process violations. There should be no question but that no such unfairness, or any unfairness, exists under the New York statutory scheme.

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[13] Furthermore, no decision of this Court has used the burden of proof as a cure-all for a statute which Petitioners and particularly *Amicus Curiae* half-heartedly argue is void for vagueness.

II. The Fourteenth Amendment Does Not Mandate A Burden of Proof Beyond A Preponderance of The Evidence Under The New York Statutory Scheme.

It is important to state at the outset what the New York statute does not do. It does not sacrifice or mitigate the rights of parents for what it perceives to be the "greater good" of children's rights. The Family Court Act is a carefully considered attempt to deal with child abuse and neglect problems in the jurisdiction.[14]

The law is based on the principle that the natural family must remain intact at all possible costs. Therefore, the most important presumption of the statute is that every home situation, no matter how neglectful or even dangerous, can be rectified. All people must do is try. If a parent in New York merely progresses toward the eventual solution of the family's problem, no rights can be lost.

However, the law also comes to grips with the realities of an imperfect world. The drafter knew, economic and social conditions being what they are, and human nature being what it is, that situations would be encountered wherein no resolution was possible. In these cases, where the parents cannot be helped, procedures were developed so that government could take steps to provide a stable home for the children involved.

The purpose of the permanent neglect statute is not punitive, even though a neglectful parent may suffer. The statute

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[14] Since the statute serves a legitimate state function in curing a social problem, we reject Petitioners' suggestion that it evidences a cultural or racial bias. A law is not unconstitutional solely because it has a racially disproportionate impact. *Washington* v. *Davis*, 426 U.S. 229, 238 (1976). Here any imbalance arises not from an intent to discriminate, but rather from the problems which poverty creates for families. See *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 833 (1977). As Petitioners have failed to show any intent to discriminate in a law which is neutral on its face, their constitutional challenge must also fail.

is remedial in nature, first and foremost to the family, and then to the child. It is designed to rescue children from the uncertainty of being legally chained to individuals who give little hope of ever acting as parents. *Matter of Barbara P.*, 71 Misc. 2d 965, 337 N.Y.S. 2d 203 (Fam.Ct.N.Y. County 1972).

Thus, the instant case cannot be decided in the vacuum of an academic discussion of the burden of proof at a permanent neglect fact finding hearing. Rather, the risk of an erroneous termination must be evaluated under all the available statutory safeguards.

A. The Due Process Rights of The Parents Are Zealously Protected By Statute And By The Courts.

The substantive and procedural law of New York concerning the permanent termination of parental rights must be deemed fundamentally fair. See Gordon, *Terminal Placement of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 St. Johns L. Rev. 215 (1971) (hereinafter *Termination of Parental Rights*). The law provides specific and stringent conditions which must be met before a court may permanently terminate the rights of the parent. Furthermore, an objective reading of the relevant case law reveals that the statute is narrowly construed by the courts. E.g., *Matter of Anita P.P.*, 65 A.D. 2d 18, 410 N.Y.S. 2d 916 (3rd Dept. 1978); *Matter of Carl and Annette N.*, 91 Misc. 2d 738, 398 N.Y.S. 2d 613 (Fam. Ct. Schenectady 1977). Indeed, in seeking to terminate parental rights, the State bears a heavy burden; only extraordinary circumstances will permit termination. *Corey L.* v. *Martin L.*, 45 N.Y. 2d 383, 408 N.Y.S. 2d 439, 380 N.E. 2d 266 (1978).

Contrary to the assertions of Petitioners and *Amicus Curiae*, the court may not apply its own subjective standards in its adjudication of parental rights. *Matter of Sanjivini K.*,

47 N.Y. 2d 374, 418 N.Y.S. 2d 339, 391 N.E. 2d 1317 (1979). The court's prime inquiry in a termination proceeding does not involve a subjective "best interest" test. *Matter of Female W.*, 47 N.Y. 2d 861, 419 N.Y.S. 2d 65, 392 N.E. 2d 1247 (1979). The court is simply not free to compare the relative benefits offered a child as a result of termination. *Matter of Leon R.R.*, 48 N.Y. 2d 117, 421 N.Y.S. 2d 863, 397 N.E. 2d 374 (1979). Rather, the court must determine whether the many conditions required by the State Legislature have been fulfilled, before it may permanently sever the parent-child relationship. These many conditions assure a fundamentally fair adjudication.

1. The Child Must Have Been Previously In The Care of An Authorized Agency.

The court has jurisdiction only over those children who have previously been removed from the home on a temporary basis. Fam. Ct. Act. § 614, 1(c). A child may be voluntarily surrendered to the temporary custody of the State. In other circumstances, the child is not placed in the care of the State until there has been a judicial adjudication that the child has been abused or neglected.[15] Fam. Ct. Act. § 1011, et seq. The parent in such a proceeding is entitled to counsel, a full hearing and a determination based upon the record and a preponderance of the evidence. *Matter of Michael B.*, 60 A.D. 2d 628, 400 N.Y.S. 2d 169 (2nd Dept. 1977). Additionally, the parent has a right of appeal follow-

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[15] An "abused child" is defined as a child whose parent has physically injured the child and the injury creates a substantial risk of death, disfigurement, impairment of physical health, or loss of organ functions. Fam. Ct. Act. § 1012e. Sexual offenses against the child are also covered by this category. *Id.* A "neglected child" is one whose physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as a result of the parents' failure to exercise a minimum degree of care. Fam. Ct. Act. § 1012f. Failure to provide food, clothing, shelter or abandonment of the child among other causes, could constitute neglect. *Id.*

ing a court finding of abuse or neglect. Fam. Ct. Act. § 1111.

But no matter how egregious the harm to the child by the parent, the State may not permanently terminate parental rights on the basis of abuse or neglect.[16] Despite such findings, New York continues to presume that the child's need for a normal family life will best be met in the home of the natural parent. Social Services Law § 384-b, 1 (a)(ii). Thus, the court in a termination proceeding is not primarily concerned with the parental conduct which resulted in the child's removal from the home. Instead, the court must assess the efforts of the parents as well as the State to reunite the family.

It is only this assessment that may trigger a finding of permanent neglect which in turn may lead to permanent termination of parental rights.[17] Social Services Law § 384-b, 7(a).

2. The Parent Must Fail To Maintain Contact With The Child Or Fail To Plan For The Future of The Child, Although Physically And Financially Able To Do So.

The statute places an affirmative duty upon a parent to maintain "substantial," "continuous" or "repeated" contact with a child in the care of an authorized agency. Social Services Law § 384-b, 7(a). This provision has generally been applied by the courts to terminate rights in extreme circumstances. Thus, where a mother fled to Virginia in order to avoid arrest and contacted her children twice by

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[16] In contrast many states permit termination solely upon a finding of abuse or neglect. *E.g.*, Ariz. Rev. Stat. § 8-533.

[17] Four grounds actually exist for the permanent termination of parental rights: (1) both parents are deceased (2) the child has been abandoned (3) the parents by reason of mental illness or retardation are unable to provide adequate care for the child (4) the child has been permanently neglected. Social Services Law § 384-b, 4(a), (b), (c) and (d).

telephone during a seventeen month period while a fugitive, the court held that she had failed to maintain substantial contact. *Matter of Melanie Ruth J.J.*, 76 A.D. 1008, 429 N.Y.S. 2d 773 (3rd Dept. 1980). In contrast, where a mother's failure to reach her children was explained by the great distance and expense involved in a trip from her residence in California to New York and where the mother had maintained frequent contact with her children by mail and telephone, the court held that the requirement of contact had been satisfied. *Matter of Tina X.X.*, 73 A.D. 2d 1013, 414 N.Y.S. 2d 53 (3rd Dept. 1980). Furthermore, a parent who is physically or financially unable to contact her child is excused from this provision. *Matter of Wayne T.D.*, 70 A.D. 2d 617, 416 N.Y.S. 2d 318 (2d Dept. 1979); *Matter of James S.*, 98 Misc. 2d 650, 414 N.Y.S. 2d 477, (Fam. Ct. Monroe County 1979).

Moreover, § 384-b, 7(a) requires the parent to plan for the future of the child. This mandate presupposes that parents take steps to correct the conditions that led to the removal of the child from their home. *Matter of Leon R.R., supra*. Once again, the court is not permitted to apply its own subjective values in evaluating the efforts of parents to formulate a plan for the future of their children. Standards to evaluate the adequacy of a plan must not be set unrealistically high, but must take into consideration the financial and social circumstances of the parent. *Matter of Orlando F.*, 40 N.Y. 2d 103, 386 N.Y.S. 2d 64, 351 N.E. 2d 711 (1976).[18] As a result the failure to plan provision is applied narrowly; doubts concerning the failure to plan are resolved in favor of the parent. *See Matter of Santosky*, 89 Misc. 2d 730, 393 N.Y.S. 2d 486 (Fam. Ct. Ulster County 1977).

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[18] The brief of Community Action for Legal Services, Inc. declares that Family Courts in New York have "refused" to follow *Orlando F.* (*Amicus Curiae* Brief at 11). The cases cited for this proposition were all decided before *Orlando F.*

In *Matter of Anita P.P., supra,* for example, the court fully recognized that if a parent found alternate employment with fewer working hours, utilized a day care program, and engaged a housekeeper, many of the problems which caused the removal of the child from the home would be cured. Nonetheless, the court found that it would not be realistic to hold the parent to such a plan because he was a baker by trade who was required to work long night hours and was also heavily in debt.

It is important to note that parents are not required to fulfill their plans or achieve any goal. The statute speaks strictly in terms of planning; it imposes no requirements of accomplishment.[19] As previously stated, the parent merely must seek to take measures that will correct the condition that caused the removal of the child from the home. This requirement has been inaccurately characterized by Petitioners as being vague and subjective. Actually, a parent's obligations under the Act are readily identified and evaluated. A typical case illustrates this point.

In *Matter of James S., supra,* a father's chronic alcoholism prevented unification of his family. Nonetheless, he steadfastly refused to take any steps to alleviate his problem with alcohol. A realistic attempt by the parent to plan for the future of his children could be identified by the court without resort to vague or subjective standards. Succinctly stated, the court identified the underlying problem confronting the family, in that case the father's alcoholism, and then ascertained whether the father was making any effort to address the problem. Since the parent refused to undertake

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[19] Not all jurisdictions are as generous. In Oklahoma, for example, following an adjudication that a child is "deprived," a parent, wishing to avoid permanent loss of parental rights, must correct within three months the conditions which led to the finding of deprivation. Okla. Stat. Title 10 § 1130.

any treatment, thereby refusing to plan for the future of his children, the court was compelled to order that his parental rights be terminated.

Nor can the planning requirement be considered unduly burdensome upon needy and destitute parents. No parent is required to undertake any planning unless he or she is physically and financially able to do so. Social Services Law § 384-b, 7. Thus, an individual living on sixty dollars a month income, housed in an abandoned school bus and recently released from jail was totally excused from planning for the future of his children because he was financially unable to do so. *Matter of Thomas T. T.*, 67 A.D.2d 788, 412 N.Y.S.2d 482 (3rd Dept. 1979).

3. The Social Service Agency Must Undertake Diligent Efforts To Strengthen The Parental Relationship.

Parents who face the permanent loss of their children are not expected to solve their problems without assistance. Embodied in § 384-b is the legislative judgment that society should not permanently terminate parental rights unless it has first tried to reestablish the parent-child relationship. As a result, the statute requires that a social agency, in whose care a child is placed, must make "diligent efforts to encourage and strengthen the parental relationship." Social Service Law § 384-b, 7. The duty of the agency pursuant to the statute is clear; the agency must help the parent alleviate the predicament that caused the removal of the child from the home. *E.g., Guardianship of Denlow*, 87 Misc.2d 410, 384 N.Y.S.2d 621 (Fam. Ct. Kings County 1976). The efforts expected of the agency include the investigation of financial problems of the parent, the formulation of viable proposals, suggestions as to the development of a plan for service, informing the parent as to the child's progress, as well as arrangements for visitation. Social Services Law § 387-b, 7(f); *Matter of Suzanne N.Y.*, 102 Misc.2d 215,

423 N.Y.S.2d 394 (Fam. Ct. N.Y. County 1979); See *Matter of Anita P.P., supra.*

Accordingly, where a father's problems were a lack of a job and stable home as well as a periodic drinking problem, it behooved the agency to aid the parent in his search for a job and housing and to recommend a suitable alcohol treatment program. *Matter of Florence X.*, 75 A.D.2d 942, 428 N.Y.S.2d 80 (3rd Dept. 1980); *Accord, Matter of Thomas T. T., supra.* Normally, if the agency fails in its duty to assist the parents, parental rights may not be permanently terminated. *E.g., Matter of Leon R. R., supra; See* also, *Matter of Mark G. G.*, 69 A.D.2d 311, 419 N.Y.S.2d 275 (3rd Dept. 1979).

Admittedly, the agency is excused from exercising diligent efforts to encourage and strengthen the family relationship when such efforts would be detrimental to the child. Social Services Law § 384-b(7). But this provision has not been expansively applied. Generally, agencies are not permitted to invoke this provision unless there is great potential for physical or emotional harm to the child. *See* 18 N.Y.C. R.R. 431.9(b)(2); *Matter of Florence X., supra.* Thus, an agency could discontinue its efforts to reunite a mother with her children, where the mother was a drug addict and was involved in a bizarre sexual crime when she and another woman "rolled" an elderly man in the mother's apartment. *Matter of Terry D.*, 53 A.D. 957, 385 N.Y.S.2d 844 (3rd Dept. 1976). However, an agency decidedly cannot fail to fulfill its statutory duty merely because it would be difficult or burdensome for the agency to undertake efforts to assist the family due to the parent's predicament. *E.g., Matter of Anita P.P., supra; Compare Matter of Shantal M. K.*, 68 A.D.2d 482, 417 N.Y.S.2d 696 (1st Dept. 1979) (diligent efforts not necessary where record reveals great potential for physical abuse) *with Matter of Suzanne N. Y., supra*

(agency must assist mother, no matter how dire her financial circumstances).

4. A Parent Must Fail In His Or Her Responsibilities For At Least One Year Following Removal of The Child From The Home.

Parental rights cannot be terminated in New York without ample demonstration of parental unfitness. A parent must fail to contact or plan for a child's future for a period of more than one year.[20] Social Services Law § 384-b(7). This requirement provides a parent with a fair opportunity to take steps to reunite the family, once a child has been removed from the home and placed in the custody of a social agency.[21] The requirement also has the salutary effect of providing a lengthy record for the court to consider, thereby reducing the chance of an erroneous determination.

5. The Permanent Termination of Parental Rights Must Be In The Best Interests of The Child.

As previously discussed, the New York statutory scheme for terminating parental rights gives every benefit of doubt to the parent. If at all possible, the State would prefer, indeed considers it socially desirable, for the family unit to remain intact. Consequently, not even a finding of permanent neglect will automatically trigger the permanent termination of parental rights. *See In Re Roy Anthony A.*, 59 A.D.2d 662, 398 N.Y.S.2d 277 (1st Dept. 1977). Following an adjudication in a "fact-finding" hearing of permanent neglect, the court must hold a separate "dispositional hearing"

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[20] In such states as Iowa, this period is as little as six months. Iowa Code § 232.116.

[21] *Amicus Curiae* correctly points out that the one year period need not be the year immediately preceding the filing of a petition for termination. However, any potential for harshness or unfairness resulting from this interpretation of the one year period is greatly reduced by the requirement of a "dispositional hearing" following a finding of permanent neglect. See discussion "5," *infra*.

to determine whether permanent termination of parental rights is in the best interests of the child. Fam.Ct. Act §§ 623, 631. An adjudication of the child's best interests must be based solely upon the separate record of the dispositional hearing and a preponderance of the evidence.[22] *See In Re "Female" M.*, 70 A.D.2d 812, 417 N.Y.S.2d 482 (1st Dept. 1979).

The dispositional hearing helps assure that parental rights will not be terminated if it is at all possible to reunite the family. The hearing works to preserve the rights of those parents whose conduct has improved subsequent to the failure to maintain contact or plan for the future of the child.[23] See *Termination of Parental Rights, supra*, at 248.

6. The Record Developed During The Fact Finding And Dispositional Hearings Must Enable The Court To Render A Fundamentally Fair Adjudication.

By statutory mandate, courts are only permitted to admit material and relevant evidence at the fact finding and dispositional hearings. Fam.Ct.Act § 624. Furthermore, social service case worker reports, which are often a significant part of the record, must be comprehensive, factual, and objective. Social Service Law § 372; 18 N.Y.C. R.R. 428, *et seq*. Entries in these reports must be based upon the first-hand knowledge of the case worker and recorded shortly after the occurrence upon which they are based. *Matter of Leon R.R., supra.*

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[22] Parents are entitled to counsel at this and every stage of the termination proceedings. Fam.Ct.Act § 262. The children are also entitled to an attorney at the termination proceeding. *See Matter of Orlando F., supra.*

[23] Thus, it is not unfair or harsh that the one year period of failure to plan and contact may not immediately precede the filing of a petition for termination. In such cases the parent may demonstrate at the dispositional hearing that his or her conduct has improved subsequent to the one year period.

It is improper for a case worker to base his allegation of parental misconduct entirely upon hearsay.[24] *E.g., Matter of Thomas T. T., supra.* Mere suspicion or rumor of parental misconduct must be excised from the case worker's file. *Matter of Leon R. R., supra; Matter of Lisa Ann U.*, 75 A.D.2d 944, 427 N.Y.S.2d 994 (3rd Dept. 1980) (anonymous and vindictive letters must be removed from file). The evidence presented against the parents cannot be conclusory but rather must be specific and detailed. *See Matter of Anita P.P., supra* at 919. Such evidence greatly diminishes the chance of an erroneous outcome and permits the court to render a fundamentally fair determination.

B. The Interests of The Children Require That The Preponderance of The Evidence Standard Be Applied In TPR Proceedings Under New York Law.

At stake in a TPR proceeding are several interests which distinguish it from other litigation requiring an upgraded burden of proof. In a criminal or involuntary commitment proceeding, the state is acting solely in a punitive fashion. Here the state action is protective of the child's interest.

However, the law itself makes no presumption that the state is acting on the child's behalf. In all TPR cases, the child is entitled to be represented by an attorney. *See Matter of Orlando F., supra.* The child's law guardian submits a report and recommendations to the Family Court and is free to argue against termination. Also, the law makes no presumption that the state is acting in the child's interest by seeking termination since a dispositional hearing is required after the permanent neglect finding. There is no presumption at this hearing that the child should be permanently removed from his natural parents. Family Ct. Act. § 631(c).

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[24] The case file in its entirety cannot even be introduced at the hearing unless counsel for the parents has been given adequate opportunity to examine its contents in order to prepare for cross-examination and rebuttal. *E.g., Matter of Florence X., supra.*

No one, of course, can be sure how judges will apply any new standard of proof. It is conceivable that a higher standard would reduce the number of terminations, resulting in increased foster care costs. However, any monetary costs are miniscule compared to the real harm. That is, since parental rights are already so well protected, it would be a denial of due process to the children involved in the litigation, if a termination was any more difficult to obtain under New York law.[25]

1. Raising The Burden of Proof Would Interfere With The Child's Right To Proper Custody.

The parental prerogative and family autonomy are premised upon the parents' assumed superior capacity to care for the child and act in the child's best interests. Parents' control over their children, however, is not absolute. "In our society, parental rights are limited by the legitimate rights and interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 630 (1979).

Children themselves possess certain rights and interests that may be in conflict with those of their parents. In addition, the state has an interest in the well-being of the child that may also be in conflict with the p arents' interests. This state interest is evidenced in the variety of statutes that authorize state intervention on behalf of neglected or abused children.

In addition, it has been decided that a child has a substantial liberty interest in not being confined unnecessarily for medical treatment. *Parham* v. *J.R.*, 442 U.S. 584

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[25] The child's interest in a TPR proceeding was not discussed in the *Lassiter* decision. However, the issue in *Lassiter* was whether the lack of counsel at a TPR proceeding would render the relative strength of the parties so unequal as to violate fundamental fairness. Since under New York law, a TPR proceeding is already a contest of equal interests, the consideration here is by what standard should that equal contest be judged. Thus, the child's interest must be considered.

(1979). Thus, it is evident that minors, as well as adults, are protected by the Constitution and possess constitutional rights.

It has been argued that among the fundamental rights of children is the right to custody.

> Juveniles have particular and peculiar rights and they require particular and peculiar treatment. The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.

Shears, *Legal Problems Peculiar to Children's Courts,* 48 ABAJ 719, 720 (1962).

The right of a child to proper custody implies the right of a child to a permanent home and a stable environment. If the child cannot be afforded proper custody with his natural parents, then he should and must be established with a legal guardian or family that can provide him with permanence.

Experts in the child welfare field have repeatedly documented the need of every child for the unbroken continuity of a loving and enriching relationship with an adult. A child needs stability in order to develop his own identity as well as interpersonal relationships with others. See Weinstein, *The Self-Image of the Foster Child* (1960).

It is also this permanence or proper custody that enables a child to develop into a responsible citizen of society. "The well-being of its children is of course a subject within the state's constitutional power to regulate. . . ." *Ginsberg* v. *New York,* 390 U.S. 629, 639 (1968). Consequently, the State "is not without constitutional control over parental discretion in dealing with children when their physical or

mental health is jeopardized. *Parham* v. *J.R.*, 442 U.S. at 603.

In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court also granted the State control over and above parental discretion. The main issue in *Ginsberg* involved the constitutionality of a New York criminal statute. The statute prohibited the sale of material defined to be obscene to minors. Obscene material was defined on the basis of its appeal to the minors, not by whether or not it would be obscene to adults. The Supreme Court, in a decision upholding the statute as valid, stated:

> While the supervision of children's reading may best be left to their parents, the k..owledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.

Id. at 640.

Constitutional law cases have not only revealed the State's right to supercede the parental prerogative in certain instances, but have also established the State's interest in protecting the welfare of children, oftentimes at the expense of the natural parents.

> . . .[B]asic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end. . . . It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.

Prince v. *Massachusetts*, 321 U.S. 158, 165 (1944).

It is this concept that the phrase "right to proper custody"

encompasses. The State's interest in the well-being of children establishes its interest in assuring that the child is afforded his "right to proper custody." The juvenile court was designed to provide children with rights to proper upbringing and to intervene when parents could or would not discharge that function. Teitelbaum, *Foreword: The Meanings of Rights of Children,* 10 N.M.L. Rev. 235, 246 (1980). If a child's parents default in effectively performing their custodial function, the State, as *parens patriae,* may intervene. *See In Re Gault,* 387 U.S. 1 (1967).

A child's well-being inherently bespeaks of a right to proper custody, *i.e.,* an opportunity to grow into a free and independent person as a result of *permanence* in home and environment. The State, as *parens patriae,* has an interest and a duty, in promoting the development of minors into responsible members of society, to assure each child is afforded his right to proper custody. Raising the burden of proof would make it unnecessarily difficult for the State to accomplish its duty.

2. The Interests of The Parent Are Mitigated At The TPR Proceeding Since They Possess Only A Biological Relationship With The Child.

In *Parham* v. *J.R.,* 442 U.S. 584 (1979) the Court noted that since a family is a cohesive unit the parents are presumed to be acting in the best interests of their children. "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this." 442 U.S. 584, 602.

Parental rights do not arise merely from the biological

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[28] It has even been suggested that a biological relationship alone is not sufficient to create a constitutionally protected family. *Moore* v. *East Cleveland,* 431 U.S. 494, 534-535 (1977) (J. Stewart dissenting), 549, (J. White dissenting).

connection between parent and child.[26] *Caban* v. *Mohammed*, 441 U.S. 380, 397 (1979) (J. Stewart dissenting). Rather, the importance of the familial relationship stems from the emotional attachments that derive from the intimacy of daily association. *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 844 (1977).

At the final termination proceeding under New York law, the parent has been deprived of the custody of his child for at least, and in most cases longer than, one year. The deprivation of custody arose from the initial circumstances of abuse and neglect. Since the parent, through his actions, has forfeited a significant portion of his liberty interest, the rights of the child must be taken into consideration.

In New York State the Legislature has taken these rights into consideration, balanced the competing interests and decided upon the preponderance of the evidence standard. Other legislative bodies are free to balance the interests and come to different conclusions. Congress did exactly that concerning the termination of the rights of Indian parents. 25 USC § 1912.[27]

Therefore, a higher standard is permissible but not constitutionally mandated.

C. There Is Little Risk of An Erroneous Termination of Parental Rights Under Existing New York Law.

The New York statute is fundamentally fair due to the procedural and substantive elements which it contains. Perhaps the most important aspects is that parental rights cannot be terminated at the initial proceeding.[28] Thus, if a

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[27] The purpose of the Act is to promote the stability and security of Indian tribes and families to preserve the *unique* values of Indian culture. See Indian Child Welfare Act 1978, U.S. Code Cong. and Ad News 7530.

[28] The bifurcation of proceedings distinguishes New York from other preponderance jurisdictions which allow a termination at the

sions prior to the filing of a permanent neglect petition. Generally, more than one extension of placement is sought before a permanent neglect petition is filed. Such a procedure guarantees fundamental fairness.

The substantive elements of the statute are also sound.[29] It is possible to prove that a parent is dead or has abandoned his children based upon readily ascertainable facts. When the state seeks to prove that an individual cannot care for his children due to a mental illness, the parent is given the protection of the clear and convincing evidentiary standard. If the agency seeks to terminate rights based upon failure to plan or maintain contact, the parent can defeat the government's action by showing some progress in one year.

Furthermore, the concept of planning gives the trial judge flexibility to evaluate each case on an individual basis. Authorities agree that statutes in this area need to be flexible. See, *Defining Child Abuse, supra* at 9. At the same time the law eliminates subjectivity by giving the judge a yardstick of one year. The trial judge can evaluate the testimony and determine if any progress has been made in one year. If there is no progress the judge need not make a subjective value judgment concerning whether the family can be reunited in the foreseeable future. He need only apply the law and presume that the child is permanently neglected.

Since the law is procedurally and substantively sound we

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[29] It is important to note that the approach taken by New York on terminating parental rights compares favorably with proposed model acts. Contact and planning requirements on the part of the parent are included in several model acts. *See* Institute of Judicial Administration/American Bar Association, Standards Relating to Abuse and Neglect, Part VIII (Tentative Draft 1977); Health and Human Services State Adoption Act (1980); Model Dissolution of Parent-Child Relationship Act (1976). These model acts also require efforts by the State to reunify the family. In contrast to the New York statute, the ABA tentative draft permits in certain cases termination at the initial dispositional hearing.

parent works to eliminate problems at home, his parental rights cannot be lost. Another important safeguard is the periodic review of foster care placement. Fam. Ct. Act § 392. At this proceeding a parent has the right to challenge an extension of foster care placement. Studies indicate that such a review system accelerates the placement of children into permanent and stable homes. See *Children Without Homes*, Children's Defense Fund (1978), 161.

Also, a parent who feels aggrieved by agency action need not wait until the expiration of the original placement order. Under Fam. Ct. Act § 1062 a parent can petition the court at any time for an order terminating placement. Under § 1064, the issues at such a hearing is whether continual foster care will serve its intended objective.

Moreover, even if the child was found to be permanently neglected, the parent is entitled to a dispositional hearing. Here, he can show that notwithstanding past actions, the home situation has progressed to the point where the child can be returned home. Both the parents and children are represented by counsel at all stages of the termination proceeding.

To summarize, the government must be able to prove a failure to plan or maintain contact for a *continuous* period of one year after the child has been placed. Since initial placements are limited to a maximum of 18 months after a finding of neglect or abuse, the agency generally will have to petition the court (on notice to the parent) to have placement extended. Therefore, the parents more than likely will have appeared in court, with attorneys, on at least two occa-

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initial hearing. See Ariz. Rev. Stat. Ann. § 8-533, 13 Del. Code § 1103(4), Idaho Code § 16-2005, Md. Ann. Code Art. 16 § 75, Mass. Gen. Laws Ann. Ch. 119 §§ 24, 26. On the other hand, not all jurisdictions have the funding for a social service agency to perform effective efforts to reunite the family.

feel constrained to respond to Petitioners' comments pertaining to the New York State Department of Social Services. Although Petitioners' comments are more properly directed to the New York legislature, a significant part of the brief of *Amicus Curiae* Community Action for Legal Services, Inc. digresses from a discussion of the issues properly before the Court to an attack of the practices of State social service agencies generally and New York City social agencies in particular. However, the issue, in the words of *Amicus Curiae,* whether "child care agencies are far more stingy in the provision of help and services to these parents than the statute requires," (Brief at 41) has never been raised by Petitioners in the instant case in any of the proceedings below. Thus, *Amicus Curiae* in the guise of discussing the burden of proof question is now asking the Court to address the issue of whether social service agencies fulfill their mandated duties. It is submitted that state court is the proper forum for this question to be initially raised.

The inappropriateness of the Court to now air grievances concerning social service agency practices is underscored by *Amicus Curiae's* lack of authoritative citation. In criticizing agency practices, their brief repeatedly cites to "their own experience." (Brief 36-49). It would be unfair at this juncture of the proceedings to consider such conclusory and undocumented attacks on social service agencies as somehow relevant to a determination of what burden of proof is constitutionally mandated in a proceeding to terminate parental rights.

Furthermore, it is apparent that New York Courts have never acted as a "rubber stamp" in response to petitions for termination filed by social services agencies. Rather, the courts serve as a neutral and detached arbiter of the issue of termination. When an agency fails in its statutory responsi-

bilities, the courts act as a counterbalance to protect the rights of the parent. *See*, e.g., *Matter of Florence X., supra; Matter of Wayne T.D.*, 70 A.D. 2d 617, 416 N.Y.S. 2d 318 (2d Dept. 1979); *Matter of Mark G.G.*, 69 A.D. 2d 311, 419 N.Y.S. 2d 279 (3d Dept. 1979); *Matter of Anita P.P., supra; In Re Guardianship of Denlow, supra.*

However, the thrust of Petitioners' case is the risk of error under a permanent neglect litigation. To completely evaluate the issue, several layers of protection which substantially mitigate the risk of error under New York law should be considered.

First, the agency does not frequently seek judicial relief. Exhibit 12 sets forth the number of reports and cases of suspected child abuse and neglect in New York State. Upon a report of a problem, the agency investigates the situation and opens a case file if necessary. Although state intervention exists, neglect or abuse petitions are filed in only a small percentage of cases. For example, in 1978, of approximately 72,000 children involved in abuse or neglect, the agency went to court only 10% of the time.[30] (Compare E702 with 728; E710 with 729; E719 with 730.) These statistics document the position, upon which authorities agree, that the state acts in circumstances in which reasonable people would have little difficulty agreeing that the intenvention is justified. See *Defining Child Abuse, supra* at 9. Also, over half of the initial custody proceedings are settled by consent of the parties. (See E731-733). Obviously, if there is no litigation, there is no risk of error. Moreover, some cases are

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[30] Even though the number of petitions filed do not necessarily arise from the abuse and neglect cases filed in the same year, the minor variation in the numbers would not materially affect the relative proportions.

settled without litigation wherein the parents agree to accept the services of the agency. (See Exhibit 14 which sets forth statistical data from various New York State counties. This data was compiled at counsel's request in July 1981 solely for this litigation.)

Second, parental lack of interest after a child has been placed in foster care must be considered. Many extensions of foster care are either uncontested or granted by default (See Exh. 14). This, of course, is completely inconsistent with the position of a parent who believes that his child was wrongfully taken by the state.

Third, not all terminations are sought under § 384-b (4)(d) (permanent neglect) where the *theoretical* risk of error is the highest. (See Exh. 14 for upstate statistics and E925-926, 947-948 for New York City statistics).

Fourth, the largest layer of protection is found at the trial court level. The strength of the trial judge's decision in the instant case leaves little room for doubt, irrespective of the standard use. By deduction, the fact that the statute worked in this instant case, where the theoretical risk of error is the highest, means that it will work in less "subjective" situations.

Certainly, the Santoskys would have received the same protection before other judges in the state (See ACLU Brief p. 36-37). *See also Anonymous* v. *Norton*, 168 Conn. 421, 430, 362 A.2d 532, 537 (1974) ("We recognize the gravity of our decision and emphasize that the termination of parental rights is a most serious and sensitive action"); see also E924. There should be no doubt that trial judges do not need a message, in the form of an increased burden of proof, that parental rights are important.

Finally, the New York permanent neglect statute is narrowly construed by the appellate courts. See Section II. A., *supra*.

III. There Was No Error In The Proceeding Below For The Termination of The Santoskys' Parental Rights.

The progression of this litigation demonstrates that, beyond a reasonable doubt, the correct result was reached. The entire object of New York law is to protect families who, notwithstanding problems, are progressing toward the eventual reunification of the family. This is amply illustrated by what the Santoskys demonstrated at the first proceeding and what they did not show at the second.

Mr. and Mrs. Santosky made no progress in dealing with their child rearing problems. At the first termination hearing, Elizabeth Smith, Director of the Family Service Center, indicated that there was improvement in this area. However, even Mrs. Smith testified that if further delay would be detrimental to the children, the petition should be granted (See E254-256). The trial judge would not adopt this view and he was upheld on appeal.[31]

Since the judge could factually determine that progress was being made, he could legally conclude that the Santoskys were planning for their children's return. Had their miniscule efforts not diminished after the filing of the first petition, the second petition would, in all probability, also have been dismissed. The Santoskys' rights were not terminated because they failed to utilize all the services such as family planning or because Mr. Santosky was unemployed.

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[31] The judge's position and New York law is clear. There is no termination *merely* because the best interest of the child might require it. (E409-414).

The law is clear, parental cooperation with a plan need only be reasonable.

Simply stated, the Santoskys lost their children because they failed to produce a single witness, *including themselves,* to testify that progress was being made. Their utilization of available counseling services illustrates why this was the case. First, they agreed to attend the Southern Ulster Mental Health Clinic (E37). They refused to attend the Family Services Center on the ground that they were attending Mental Health (E44). Ironically, after the December 1977 evaluations (E679-684), they refused to attend the Mental Health Clinic on the assertion that they were going to the Family Service Center (Petitioners' Brief p. 10). In any event, they attended the Center approximately one-third of the time. Even the Center's Director, their strongest advocate at the first hearing, lost hope when they refused to participate in the Child Enrichment Program. She concluded that it would be impossible to return the children home in the foreseeable future (J.A. 16-18).

The presence of other children complicated the situation. Elizabeth Smith testified at the first permanent neglect hearing that, with another child in the home, it would be a bad idea to immediately return the others (E202-206). Even Mr. Santosky testified that it would be a lot easier if the children came home one at a time and to have the others visit overnight (E519).

At the second termination proceeding, the excessive length of time the children had spent in foster care had created a problem. These children now regarded their natural parents as strangers (J.A. 10, 12, 14, 21). The Santoskys' actions, which precipitated state intervention, now reduced their parental status to a mere biological relationship.

Finally, the law guardian for the children vigorously

argued, as he had in the first proceeding (E590-598), that the parental rights should be terminated (Tr. 421-432).

A. The Instant Case Demonstrates The Appropriateness of The Present Standard Under New York Law.

This case deals with the parental failure to plan for the future of the child but there are other situations in which parental rights can be lost. Under Social Service Law § 384-b(4)(a), if both parents are dead and no legal guardian has been appointed, then a termination can occur. Parental rights can also be lost under § 384-b(4)(c) if both parents are unable to care for their children by reason of a mental illness. However, to be successful under this section the government must prove its case by clear and convincing evidence. Social Service Law § 384-b(3)(g). Another ground for termination is where the child has been abandoned within the purview of § 384-b(4)(b). The state already bears a heavy burden under this section since it must show that a parent has forfeited his parental rights. Therefore, a child will not be deemed abandoned unless the evidence establishes a "purposeful ridding of parental rights—a withholding of interest, presence, affection, care and support," *Corey L.* v. *Martin L., supra,* at 443. Since the government's burden here is already difficult, a preponderance standard does not offend fundamental fairness under § 384-b(4)(b). See *Vance* v. *Terrazas,* 444 U.S. 252, 267 (1980).

Petitioners have failed to even assert a plausible argument of why the preponderance standard is inappropriate for the above mentioned termination methods.

The termination of parental rights, based upon failure to plan, is the litigation in which the risk of error is at its peak. Therefore, if the standard worked properly in the instant

case, it will no doubt work in other situations where the risk of error is less. This case is, therefore, the perfect medium through which the standard can be evaluated.

New York law requires that parents plan for the future of their children by working towards the *eventual* reunification of the family. Actual accomplishment of the goal is not required. Therefore, Petitioners have overlooked an important concept. This is, the primary focus of § 384-b (4)(d) is *prospective*. Under the law, judges are given an objective guideline to evaluate future human behavior based upon past performance (See E244, 247, 413).

The government's burden under this section is very heavy as the state must prove a negative state of mind. The agency must demonstrate that a parent does not intend to change, since if a parent intends to, but cannot, progress or plan for the future of his children, he is excused from doing so. Fam. Ct. Act § 614(d).

Proving a negative is one of the most difficult undertakings in trial practice. When combined with the showing that the parent will not progress in the foreseeable future, the successful prosecution of the agency's case becomes very difficult. No matter how much documentation or testimony the state provides, there is always the hope, however remote, that the parents will solve the problem and the children can be returned. As previously established, children have rights, also.

A motion is presently before the Court in the case of *Maffey* v. *Oregon*, No. 80-5227 [Or. App., filed Aug. 8, 1980]. A bench ruling in the case demonstrates the state's difficulty here. The lower court found, beyond a reasonable doubt, that the best interests of the child required termination. However, the judge could only find it was more likely than not that Mrs. Maffey would be unable to adjust or change her life. (See Exhibit 16.)

The New York statute goes a long way towards eliminating the soul-searching a trial judge must do when weighing the competing interests. The law stipulates that if no progress is made by the parents within one year, then it is presumed that parental rights should be terminated. However, this is only a presumption which can be rebutted at the dispositional hearing. Such a procedure is fundamentally fair to the parents since mere progress by way of minimal cooperation with the social service agency is enough.

The underlying facts which determine whether the parents cooperated with the agency are readily ascertainable and therefore no higher burden of proof is required.

However, the real safeguard lies in how easily a parent can defeat the state's prima facie case. Although the burden of proof always lies with the government, the burden of going forward will shift as the litigation develops. A typical TPR case will proceed as follows. The state will produce witnesses to testify that no progress or planning took place in a certain one year period. Assuming that the witnesses were not completely impeached by cross examination, the burden of going forward will shift to the parents who will attempt to show what was done in the same year. It is here that the state's case can easily be defeated. The parents need only produce a witness, *including themselves,* to tell the court what progress and planning transpired.

This is clearly illustrated by the instant case. At the first termination proceeding, in addition to the testimony of Elizabeth Smith (See E212-213, 241), Mr. Santosky took the stand and testified that he was planning for the future of his children by increasing the available living space in his home (E488). Both the trial (E619) and appellate courts (See *Matter of John W., supra*) found this action to be planning even though the agency never considered housing a problem (E499-500). Mr. Santosky's actions stand in

stark contrast to the second termination proceeding where neither he nor his wife testified.

Moreover, there is a rational relationship between the burden of proof and the nature of the case. The law assumes that if a parent fails to make any progress in one year it is more likely than not that he will be unable to change in time to successfully reunite the family. This is a sound legislative judgment based upon the established fact that problems arise for the child, and for eventual reunification of the family, if placement in foster care exceeds one year (*See* E49, 134 and *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 836 (1977). It is also sound legislative judgment based upon the nature of the therapeutic and rehabilitative process, which cannot be overturned in the absence of blatant fundamental fairness violations.

The state's burden is already heavy. It must show what a person, based upon past actions, will not do in the future. As it takes so little testimony by way of readily ascertainable facts to dismiss the petition, there is no need to make the process more difficult (See E924).

Finally, the result of the agency's action is to place the child in a permanent home. Indeed, the state succeeds in obtaining permanency over half the time when termination occurs. (See Exhibit 17.)

B. In The Alternative, The Instant Case Need Not Be Remanded Since It Is Correct Under Any Standard of Proof.

In the exercise of its appellate jurisdiction, this Court not only has the power to correct error in the judgment under review, but also to make such disposition of the case as justice requires. *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1939). In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), a statute was found unconstitutional and the Court

reviewed the record to determine whether the evidence was sufficient to meet the new standard.

If the Court finds that another burden is constitutionally mandated, it is respectfully maintained that there exists a moral imperative to review the record and determine whether the evidence meets the new standard. The children should be left in limbo no longer.[32]

There should be no doubt but that the children were permanently neglected beyond a reasonable doubt and that the trial judge had absolutely no reservations about his factual findings. Although the judge used the preponderance standard, he expressed his real feelings on parental terminations at the first hearing (E246):

> When you permanently terminate parental rights you cut them off and terminate them for all time. It's a very serious thing for any court to be asked to do. I frankly shy away unless it's absolutely necessary in order to discharge my responsibility that I must do so out of the long term best interests of the children and substitute the interests of the parents and put that down at the bottom of the list of priorities.

At the first termination proceeding, the judge found that although the Santoskys were not model parents, they were progressing. At the second proceeding, since their efforts were no longer measurable, he was convinced that the family could not be reunited in the foreseeable future and granted the petition.

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[32] Furthermore, the agency must make diligent efforts for at least one year before a permanent neglect action could even be entertained. Since the parental rights were terminated, no efforts, much less diligent ones, have or could have been undertaken by Ulster County to reunite the family. Thus, a remand to the state court could frustrate any chances these children have of obtaining a permanent home.

Accordingly, the factual determinations of the trial court are more than adequate to permit disposition of the case without a remand under a higher standard of proof.

CONCLUSION

In light of the foregoing, Respondent requests that the judgment of the Supreme Court of the State of New York, Appellate Division, Third Department, be affirmed.

Respectfully submitted, this 10th day of August, 1981:

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